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No. 772

In the

Supreme Court of the United States

October Term 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners Thomas F. Carter and Carter Electronics Corporation pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals (set out Appendix A, *infra*) is reported at 365 F. 2d 486.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Should the doctrine of primary jurisdiction be invoked in an antitrust suit where agency determination would not be decisive of any relevant issue in the antitrust proceeding?

2. (Conditionally Presented) In an antitrust suit is the primary jurisdiction referral order appealable under the collateral order doctrine?

STATEMENT

The present suit was brought by Petitioners Thomas F. Carter and Carter Electronics Corporation against Respondents American Telephone and Telegraph Company, Southwestern Bell Telephone Company, and General Telephone Company of the Southwest to recover damages for, and to secure preliminary and permanent injunctions against continuations of, violations of the Sherman and Clayton Antitrust Acts. (15 U.S.C. § 1, 2 and 14).

The complaint alleges that Petitioners have developed and manufactured a successful electronic device, known as the Carterfone, which provides a source of competition with the Respondents' mobile radio-telephone communications system. It alleges that there is a substantial market for communications systems of this type, and that the Peti-

tioners' product was able to compete successfully in the open market, but that the Respondents, using their monopoly power over telephone communications, have prevented the Petitioners from competing by threatening to discontinue the telephone service of any telephone subscriber who uses Petitioners' product. The complaint specifically alleges that the Respondents have combined and conspired between themselves and with other telephone companies to prevent Petitioners from manufacturing, distributing and selling the Carterfone; that the Respondents have, on a concerted basis, refused to permit subscribers to deal with Petitioners; that conduct of the Respondents was deliberately taken with the intent to restrain trade; that Respondents, acting together and with other telephone companies, have attempted to monopolize and have monopolized a significant line of commerce; and that these actions constitute violations of the antitrust laws of the United States for which Petitioners are entitled to damages. (R. 77-91).

Simultaneously with the filing of their complaint, the Petitioners filed a Motion for Preliminary Injunction, praying that the trial court enjoin the Respondents from a continuance of the antitrust violations. (R. 92-99).

Each of the Respondents filed a Motion to Dismiss, asserting (a) that the Court had no jurisdiction over the subject matter of the action, as exclusive primary jurisdiction was vested in the Federal Communications Commission, and (b) that the complaint failed to state a claim upon which relief could be granted. (R. 99-100; 145-146). Respondents have not filed an answer to the complaint and no

facts or testimony have been presented to or heard by the Trial Court. The allegations of the complaint are thus taken as true.

Respondents sought, by invoking a tariff they wrote and filed with the Federal Communications Commission, to "justify" the illegal conduct set forth in the complaint. The essence of Respondents' position is that all actions taken by them were required and justified by their tariff. The Petitioners contended, regardless of the applicability of the tariff to the conduct in question and regardless of the tariff's administrative validity, that the tariff could not confer any immunity from the violations of the antitrust laws alleged.

On February 8, 1966, the Trial Court entered an order overruling the Respondents' Motion to Dismiss, but holding all further action on the case in abeyance pending the conclusion of "appropriate administrative proceedings" before the Federal Communications Commission. (R. 148-156). Petitioners filed a Petition for Rehearing, requesting that this portion of the Court's order be rescinded, or in the alternative be clarified (R. 157-161), and a motion requesting that their application for a preliminary injunction be set for a hearing. (R. 161-162). Both the motion for hearing on the preliminary injunction and the petition for rehearing were summarily denied. (R. 162-163). Petitioners gave notices of appeal (R. 167-169) with reference to both the order denying the preliminary injunction and the order of February 8, 1966. Petitioners also filed a motion for writ of mandamus with reference to the order of February 8. The Court of Appeals held that it had jurisdiction under 28 U.S.C. § 1292(a) (1)

and accordingly dismissed the appeal taken under the collateral order doctrine and the petition for mandamus (all proceedings involved the single issue of primary jurisdiction).

In the event this Court should feel that the preliminary injunction appeal does not lie or does not permit full review, then Petitioners urge under the Second Question (conditionally presented) that the trial court Order of February 8, is appealable under 28 U.S.C. § 1291.*

Although the Court of Appeals did not directly question the well-established rule that FCC approval of a telephone company's tariff would not grant an immunity from the antitrust laws, the court held that the presence of the tariff required referral under primary jurisdiction and accordingly affirmed. (Appendix A, *infra*).

Subsequent to the ruling by the Court of Appeals, the FCC entered an order accepting referral and setting forth the issues for agency determination. (Set out Appendix B, *infra*.)

REASONS FOR GRANTING THE WRIT

I. *Decision Below Presents Significant Questions Concerning Application Of Primary Jurisdiction To Antitrust Proceedings Which Should Be Resolved By This Court.*

* Such a collateral order is appealable because, in the language of Justice Jackson in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), at 546-547, the Order does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment"; if review is postponed until the time of final judgment, then "it will be too late effectively to review the present order and the rights conferred * * * will have been lost, probably irreparably"; and the order "is a final disposition of the claimed right which is not an ingredient of the cause of action and does not require consideration with it." See also *6 Moore's Federal Practice* ¶54.14.

Petitioners submit agency referral should be limited to cases where it would resolve decisive issues in the antitrust proceeding. To generally invoke primary jurisdiction in cases involving regulated industries would cripple the vital policy of the antitrust laws.

To establish in the case at bar that FCC determination will not govern the critical antitrust issues, it is first necessary to examine those issues. Petitioners' unchallenged allegations (and affidavit) assert, among other matters, that the Respondent telephone companies in combination have threatened to cut off the telephone service of all telephone subscribers who use the Carterfone—a competing product with the Respondents mobil radio-telephone system. Under the holdings by this Court in *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961), *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), and others,* Respondents' conduct constitutes a *per se* violation. Since primary jurisdiction could be invoked properly in both *per se* and non-*per se* cases, the importance in the case at bar of the conduct being a *per se* violation is that this isolates in sharp focus the critical antitrust issues. The rule in regard to the *per se* issue of "reasonableness" is summarized in the *United States Attorney General's Report on the Antitrust Laws*, (1955) at p. 12, as follows:

> "Certain arrangements which Section 1 proscribes are * * * by reason of their nature or necessary effect, 'conclusively presumed' unreasonably to restrain com-

* See also *Eastern States Retail Lumber Dealers Association, et al. v. United States*, 234 U.S. 600 (1914); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originator's Guild v. Federal Trade Commission*, 114 F. 2d 80, *aff'd*, 312 U.S. 457. (1941).

> petition (the so-called unreasonable *per se* offenses). The most important of these involve fixing prices or limiting production. *Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends.*" (emphasis added).

Thus in the present case there should be no *factual* inquiry as to reasonableness of the Respondents' conduct. Yet the trial court in invoking primary jurisdiction stated it was doing so in order to "charge a jury on the basis of the FCC determination of reasonableness." (R. 71, see also R. 66-67). Although on appeal the Fifth Circuit recognized the *per se* nature of the antitrust violation and apparently discredited the trial court's position (see 365 F. 2d 486 at 497, n. 20), it upheld referral because the Respondents purportedly acted pursuant to an equipment tariff which Respondents had written and filed with the FCC. It should be noted that a charge to the jury on the FCC findings would be erroneous whether the case is *per se* or not. An FCC finding of tariff reasonableness cannot lawfully be translated by the trial court into reasonableness of anti-competitive *conduct*. Antitrust fact conclusions cannot be delegated to, or decided by, the FCC.

As noted in the opinion below (365 F. 2d 486 at 490), Petitioners anticipated that the Respondents' defense would center upon their tariff. In the present case administrative determination of the validity of the tariff would be relevant only if such a determination would confer *immunity* from the antitrust laws. The court below colorfully rejected Petitioners' position that the administrative validity of the tariff would be immaterial to the antitrust case:

> "It is here that their [Petitioners'] position becomes an enigma wrapped in a mystery. After formally denying

> validity or inapplicability of Tariff No. 132 in Par. XI (note 5, *supra*), in a number of ways and at endless times throughout the briefs to us they assert that they 'have not attacked the reasonableness or validity' of the tariff 'as a regulatory measure,' and they 'are quite content to assume, for the purposes of this appeal, that the tariff is valid under agency standards but' they add, 'not under antitrust standards.' Struggling as we do to divine their theory * * *." 365 F. 2d at 492.

For the reasons that follow Petitioners submit that FCC approval of the tariff would not grant an immunity from the antitrust violations and that the action of the court below in invoking primary jurisdiction is contrary to the rationale of decisions by this Court.

It is quite clear that the Communications Act does not confer any immunity, or provide for any exemption, applicable to the facts of the case at bar. There is no express exemption or immunity provided for in 47 U.S.C. Sections 201, 202, or 203. The only section of the Communications Act which purports to confer any exemption, 47 U.S.C. Section 222, has reference to consolidations and mergers specifically approved by the FCC.

The Supreme Court has already considered this precise question and has determined that the Communications Act does not confer any exemption from the antitrust laws. In *United States v. RCA*, 358 U.S. 334 (1959) this Court reviewed the legislative history of the Act and concluded:

> "While this history compels the conclusion that the FCC was not intended to have any authority to pass on anti-trust violations as such, it is equally clear that

> Courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." 358 U.S. at 343, 344.

At a later point in the opinion this Court noted:

> "It [the Congress] apparently considered that inherent in the scheme of the Act was the right to challenge under the anti-trust laws even transactions *approved* by the Commission * * *" 358 U.S. at 345 (emphasis added).

After further discussing additional legislative history this Court reiterated:

> "Thus, the legislative history of the Act reveals that the Commission was *not* given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." 358 U.S. at 346.

An even stronger holding on primary jurisdiction and immunity is contained in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). There a bank merger was approved by the Comptroller of the Currency, in accordance with the directory provisions of the Bank Merger Act. This Court, while noting that banking is a pervasively regulated industry, and that the merger had received the approval of the appropriate administrative body, nevertheless held that the merger was prohibited by Section 7 of the Clayton Act. The banks contended that the prior administrative *approval*, under a statute which expressly required the consideration of competitive factors as a part of the administrative process (*un*like the Communications Act),

immunized the merger. Such position was repudiated by this Court, which held:

> "Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, . . . immunizes approved mergers from challenge under the federal anti-trust laws. We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the anti-trust and regulatory provisions. . . ." 374 U.S. at 350, 351.

With specific reference to the doctrine of primary jurisdiction, this Court ruled:

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme . . . .
>
> * * * * *
>
> " . . . Furthermore, the considerations that militate against finding a repeal of the anti-trust laws by implication from the existence of a regulatory scheme *also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.*" 374 U.S. at 353, 354 (emphasis added).

The last comment of this Court is particularly appropriate to this case. Petitioners' rights to a recovery upon the violations they have alleged will, to say the least, be "attenuated" by requiring a lengthy and expensive proceeding before the FCC prior to obtaining a determination by the courts, particularly when no purpose will be served.

Respondents are engaged in business subject to regulation by the FCC, and they are required to give public notice of the regulatory practices they intend to follow. Since all of their practices and policies are subject to the publication requirement, for a court to hold that the Respondents are immune from liability from conduct performed in accordance with their published policies (tariffs) would be a blanket grant of immunity from the federal antitrust laws. The regulatory tariffs are drafted and published by the Respondents themselves and automatically become effective thirty days after publication. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) this Court held that, absent an express repealer of the antitrust laws, the taking of action authorized by a regulatory rule did not of itself confer any antitrust immunity.

In *California v. Federal Power Commission*, 369 U.S. 482 (1962) an application was pending before the Federal Power Commission for approval of a merger as required under provisions of the Natural Gas Act. The Government sued in federal district court to enjoin the merger on antitrust grounds. This Court held that under such circumstances, *the Commission's administrative findings should await the decision of the Courts.* The primary jurisdiction position advocated by the Respondents and adopted by the court below is the precise reverse of this Court's holding. Yet this Court's policy is most likely to produce a speedy and proper determination of the issues between the parties. Where the

agency action will not resolve the antitrust questions involved, the federal courts should exercise their jurisdiction without attempting to delegate their antitrust responsibilities to an agency which has no such jurisdiction.

Previously, this Court had held in a *per se* conspiracy to restrain trade that the *Courts (not administrative agencies) have jurisdiction to determine the matter*, even though the subject matter of the conspiracy was an agreement to fix rates, and the rates so fixed were within the special province of the appropriate administrative tribunal. *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439 (1945).

Contrary to the principles of the above Supreme Court cases, the opinion below directed referral even though no immunity would result and no material issue would be decided:

> "In affirming this primary jurisdiction reference to the FCC, we must sound to all hands this caveat. In analyzing the contentions pro and con in the quest for seeking and identifying critical issues for initial administrative determination, nothing we have said or left unsaid, nothing expressed or implied, is to be considered as even a remote possible whisper of a suggestion as to how any one or more or all of the issues now disclosed or hereafter revealed are ultimately to be decided. All of those decisions are to be made first by the trial Judge when and after the primary jurisdiction reference has been concluded." 365 F. 2d at 499-500.

Yet, earlier in its opinion the Court below reluctantly conceded that in the "weird antitrust world" it might be

possible for the tariff to be valid for agency purposes but not for antitrust purposes (365 F. 2d at 495), but then went on to state several pages later:

> "There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone . . . . If it [the tariff] is legal, . . . then surely a significant issue having important, if not decisive, impact on the outcome of the antitrust litigation has been exercised." 365 F. 2d at 497 (these statements by the court were made after the court had characterized Petitioners' position as "an enigma wrapped in a mystery." 365 F. 2d at 492).

Because no immunity would result, the issues framed by the FCC for determination (Appendix B, *infra*) would not be dispositive of any critical issues to the present antitrust action, *viz.* an adverse agency determination would not preclude Petitioners' right to recover damages. *Respondents have yet to identify an administrative finding that would be decisive of any relevant antitrust issue.* Petitioners, however, neither object to the FCC proceedings nor question the administrative propriety of the hearing, for that hearing is separate from and independent of the antitrust suit below.

The court below appears to have adopted the following view of Davis:

> " . . . 'even if the court thinks that the arrangement alleged to violate the anti-trust laws cannot be legally approved by the agency . . . 'the court should still allow the agency first to pass upon the question.' 3 Davis Administrative Law §19.07, at 40 (1958)." 365 F. 2d at 499.

With deference, Petitioners submit the correct rule is well summarized by McGovern:

> "Nor is there any scope for the operation of the [primary jurisdiction] doctrine where the agency's views on a given issue may have only academic interest for a court. The purpose of the doctrine is not to give litigants a sleighride. If the agency determination of the issue is *not relevant to the disposition* of the matter in Court, no justification exists for a reference * * * *
>
> * * * * *
>
> The purpose of the doctrine of primary jurisdiction in this field [antitrust] is not merely to place a premium upon pleading skills but rather to evaluate whether the *critical issues* posed in the antitrust case actually fall within the policymaking competence of the regulatory agency." *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA, Section of Antitrust Law 57, at 66, 67 (1958). (emphasis added).

The overwhelming power of some industries is the reason why they are regulated and why they must give public notice of their business policies through the publishing of tariffs. The tariff requirement is not to erect a shield from antitrust laws but to subject the practices of regulated industries to challenge on other grounds. Because of their power, and the difficulties of entry, the regulated industries can crush competition at the outset and extend with ease their monopoly. If the victims of such antitrust violations must first pursue administrative relief, there will be no reasonable possibility for the emergence of a new and competitive company. *E.g.* in *Hush-A-Phone, Corp. v. United*

States and AT&T, 238 F. 2d 266 (D.C. Cir. 1956) where the plaintiff sought agency relief instead of antitrust relief, the administrative hearing alone lasted some seven years—1948 to 1955. (The question there was very simple—could a plastic cup-like device be placed on the telephone handset?) While it is expected and hoped that the present FCC proceeding will be resolved in less than seven years, Petitioners should not be put out of business until an agency determination is made which will not control the antitrust proceeding. Until Congress states to the contrary, the public policy in favor of the enforcement of the antitrust laws should govern.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be Granted.

Respectfully submitted,

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APPENDICES

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Appendix A

Opinion and Judgment of Court Below, Carter et al. v. AT&T et al., 365 F. 2d 486 (5th Cir. 1966) ..... A-1—A-27

Appendix B

Order of Federal Communications Commission, Docket No. 16942, In the Matter of Use of Carterphone Device in Message Toll Telephone Service ..... B-1—B-4

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APPENDIX A

In the

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 23,556

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.,
Appellees.

Appeals from the United States District Court for the Northern District of Texas.

No. 23,557

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

v.

HONORABLE JOE E. ESTES, Chief Judge, United States District Court, Northern District of Texas, et al.,
Appellees.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas

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(August 17, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

BROWN, Circuit Judge: At issue here is whether a District Court in a private antitrust action for triple damages and injunctive relief should invoke the doctrine of primary jurisdiction to refer a question of tariff validity to the regulatory agency. It comes to us from a denial of a preliminary injunction. We agree with the District Court's primary jurisdiction reference to the Federal Communications Commission and affirm.

I.

At the outset we conclude that we have jurisdiction of the appeal under 28 USCA §1292(a)(1) as a denial of a preliminary injunction and the Telephone Company's motion to dismiss the appeal must accordingly be denied.

We need only briefly sketch the chronology. The complaint, filed November 29, 1965, was accompanied by a separate formal motion for preliminary injunction. The plaintiffs-appellants requested an early setting which would include the application for preliminary injunction. Thereafter by an exchange of letters among counsel and the Court and an informal pretrial conference in mid-December, the Judge extended the time for the defendants' responsive motions

or answers to January 14, 1966. The defendants filed a motion to dismiss on the dual ground (a) asserting primary jurisdiction in the FCC and (b) failure to state a claim. The Court subsequently fixed a hearing for February 7, 1966, and by the Court's direction, this hearing was to be (and was) confined to the motions to dismiss. At the conclusion of the extended hearing February 7, the Judge announced orally his decision denying the motion to dismiss for failure to state a claim, but holding the case in abeyance until determination of the tariff's validity by the FCC. This was followed February 8 by a formal written memorandum order. Subsequently on February 16, the plaintiffs-appellants filed separate motions for rehearing and for a hearing on the motion for preliminary injunction. On February 24, each motion was denied.[1]

Thus there is no doubt that both by the initial prayer in the complaint and by formal motion, the plaintiffs-appellants sought a preliminary injunction. Equally uncontradicted is the fact that such injunction was not granted. But, appellees argue, it is not that simple. On their theory, the Court having on February 8 put the case in abeyance pending reference to the FCC, the application for preliminary injunction was but a part of the case thus deferred, for the Court did not deny the preliminary injunction, only the hearing thereon. Consequently, the argument runs, the formal

[1] The order as to preliminary injunction stated:

> "Having duly considered Plaintiffs' Motion for Hearing on Preliminary Injunction filed herein on February 16, 1966, the Court is of the opinion that for the reasons stated in its Memorandum Order entered herein on February 8, 1966, such Motion should be and is hereby DENIED."

motion for a preliminary injunction was but a paper means of casting the primary jurisdiction reference ruling into an appealable form and not, as it really was, a mere stay order. This rests, in turn, on the generally accepted proposition that orders merely staying further action pending some event are not generally appealable.[2]

On this reading, the Judge was simply declining to entertain any requests until after the reference. But we read it differently. In the colloquy at the end of the February 7 hearing the Judge made it plain that the plaintiffs could file and he would consider all motions desired. The Judge did not treat the reference order as a ground merely for not *considering* the request for preliminary injunction. Rather, he treated the reference order as the *reason* why the injunction should be denied. It is, of course, the denial of a preliminary injunction, not the validity of the reasons therefor, which triggers the interlocutory appeal as a matter of right under §1292(a)(1). Our conclusion is not in any sense at odds with *Allied Air Freight, Inc. v. Pan American World Airways*, 2 Cir., 1965, 340 F. 2d 160, cert. denied, 381 U.S. 942, ... S. Ct. ....., 14 L. Ed. 2d 683, or *American Airlines, Inc. v. Forman*, 3 Cir., 1953, 204 F. 2d 230, cert. denied, 346 U.S. 806, 74 S. Ct. 54, 98 L. Ed. 336. In *Allied Air Freight* the unsuccessful plaintiffs in a triple damage action (not injunc-

[2] Republic of China v. National City Bank, 2 Cir., 1952, 194 F. 2d 170; Brande v. S & S Mach. Co., 2 Cir., 1958, 252 F. 2d 297; International Nickel Co. v. Martin J. Barry, Inc., 4 Cir., 1953, 204 F. 2d 583; United Gas Pipeline Co. v. Tyler Gas Serv. Co., 5 Cir., 1957, 247 F. 2d 681, cert. denied, 355 U.S. 895, 78 S. Ct. 263, 2 L. Ed. 2d 193; Jackson Brewing Co. v. Clarke, 5 Cir., 1962, 303 F. 2d 844, cert. denied, 371 U.S. 891, 83 S. Ct. 190, 9 L. Ed. 2d 124; United States v. Richardson, 5 Cir., 1953, 204 F. 2d 552; 6 Moore, Federal Practice, §54.07.

tion) sought to make the stay a vicarious granting of a preliminary injunction. On familiar principles, see note 2, *supra*, this would not work. In *American Airlines* the defendant sought to appeal from a denial of its motion to dismiss on the ground that primary jurisdiction was in the CAB. Not unexpectedly the Court of Appeals found no appealable order and also denied relief by mandamus.

The serious question of primary jurisdiction reference is therefore properly before us.[3]

II.

In analyzing the plaintiffs' complaint, it is well to bear in mind their blunt, bold position. The appellants claim that the trial Court by applying the doctrine of primary jurisdiction has effectively precluded them from obtaining the antitrust relief which they seek. Further, it is their position that the doctrine of primary jurisdiction does not apply because administrative agency approval does not immunize the Telephone Company's conduct from the operation of the antitrust laws, especially where the violation of those laws is claimed to be *per se* since an administrative determination

[3] The companion case for mandamus (No. 23,557) is dismissed as is the effort to appeal the February 8 stay order after denial of certification by the trial Court under 28 USCA §1292(b). With the flexibility given §1292(b) by this Circuit, unlike some others, Hadjipateras v. Pacifica S.A., 5 Cir., 1961, 290 F. 2d 697, 1961 AMC 1417, Agricultural Trans. Ass'n. v. King, 5 Cir., 1965, 349 F. 2d 873; Ex parte Tokyo Marine & Fire Ins. Co., Ltd., 5 Cir., 1963, 322 F. 2d 113, the interlocutory certification method has many attractions in primary jurisdiction reference situations. Since the Court of Appeals must affirmatively allow a 1292(b) appeal, it affords a very early look-see as to whether in the given situation the primary reference order will ultimately be sustained in all likelihood.

of reasonableness would be irrelevant, and because there are no issues relevant to a disposition of the case at bar which require administrative expertise for their determination.

The complaint sought triple damages and injunctive relief under the antitrust laws. 15 USCA §§15, 22. Only two defendants were named and served, A.T.&T. and General.[4] These two along with 26 other named, but nonparty, telephone companies, 19 of which are owned and controlled by A.T.&T. were alleged to have jointly and severally conspired as a part of a common design to prevent the plaintiffs from marketing and distributing their Carterphone device.

The Carterphone, developed by the individual plaintiff Carter and manufactured and distributed by the corporate plaintiff, Carter Electronics, is a device for use with the traditional telephone handset. When in use, the telephone receiver handset is placed on a cradle which forms part of the Carter-phone unit and by the process of induction, without any electrical connection or wiring or physical attachment, the Carterphone unit activates a two-way radio communication system to permit the telephone caller to converse with another person who may be located miles away from the telephone receiver handset. Similarly, the device works in the opposite direction to permit further transmission by landlines of voice signals originating by mobile radio transmitter.

A substantial market throughout the United States has been developed competing in the product-relevant-market of the manufacture and sale of devices permitting private

[4] American Telephone and Telegraph Company, and the General Telephone Company of the Southwest.

subscribers from regulated telephone companies to transmit telephone calls to and from points beyond the handset. Despite this economic demand the defendant Telephone Companies acting in concert with one or more or all of the named nonparties have taken concerted action to monopolize interstate commerce. These Telephone Companies sell and lease mobile radio-telephone units to their subscribers throughout the United States. These mobile units perform a function essentially similar to that afforded by the Carterphone and thus both are directly competitive. In violation of the antitrust laws, the Telephone Companies are undertaking to exclude the plaintiffs and other similar competitors from manufacturing or selling devices which would compete with Telephone Company-furnished mobile units.

To bring this about the Telephone Companies as sellers and lessors have required private subscribers, as buyers and lessees, not to deal with the Carterphone unit. Such requirements, conditions and understandings constitute concerted action which have no reasonable purpose but which do have a damaging effect on competition. The Telephone Companies with the specific intent to restrain trade and commerce have deliberately and purposefully issued instructions to their agents and those of the nonparty Telephone Companies to forbid the use of the Carterphone device by their private subscribed customers. Each of the Telephone Companies, due to its size and economic resources, has both the power to control the prices of competitive communication devices and the power to exclude competitors. The Telephone Companies in conspiracy and combination with each other as well as the named nonparty companies have exercised their eco-

nomic power within the relevant market to require their customers to refrain from purchasing or using the Carterphone.

At this point in the complaint, the plaintiffs, wisely we think, anticipated the matter of regulatory tariffs. They expressly allege in Paragraph XI that the Telephone Companies "in order to accomplish the violation of the federal antitrust laws heretofore set forth, have published a regulatory tariff which purports to prevent the use of a device similar to the Carterphone * * *. Such tariffs are similar or identical to * * * AT&T tariff FCC No. 132," a copy of which was annexed to the complaint "and incorporated herein."[5]

[5] Tariff FCC No. 132:

"MESSAGE TOLL TELEPHONE SERVICE

"B. GENERAL REGULATIONS (Cont'd)

"7. *Unauthorized Attachments or Connections*

"No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service."

Though the tariff was amended in response to the Commission's order in Hush-A-Phone Corp. v. American Tel. & Tel. Co., No. 9189, FTC, Feb. 6, 1957, following the decision in Hush-A-Phone v. United States, D. C. Cir., 1956, 238 F. 2d 266, to permit the attachment of devices similar to the Hush-A-Phone for the convenience of the user, the prohibition on non-furnished equipment such as the Carterphone was carried forward in the concluding paragraph of Section B. 24:

"Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communications line or channel of the Company or of any other person."

See FCC Public Notice No. 57-518, May 15, 1957.

(footnote continued on following page)

The plaintiffs then go on to allege that "although the Plaintiffs deny that such tariff is a valid tariff and that such tariff is applicable to the Carterphone, regardless of its validity and its application," the Telephone Companies "have, as a part of a common design and scheme, in uniformly publishing and enforcing such tariff, wrongfully used such tariff to accomplish a violation of the antitrust laws of the United States. Such tariff does not and may not authorize or excuse the aforementioned violation of the antitrust laws * * *."

Then followed a brief description of the damage suffered because a large number of orders for Carterphones had been cancelled by customers and dealers due to the conduct of the Telephone Companies. The formal prayer for injunctive relief, broad and sweeping in its terms, would forbid enforcement or application of Tariff No. 132.[6]

(footnote continued from preceding page)

It rounds out the tariffese that the interconnection privileges "otherwise provided in this tariff" (§B.24, supra) do not purport to touch the Carterphone or similar devices. Tariff FCC No. 132 sections which allow interconnections under certain conditions are as follows: §B.25 (connections with facilities of power, pipe line, and railroad companies pursuant to Tariff FCC No. 134); §B.26 (connections with experimental satellite facilities through connecting equipment provided by the telephone company); §B.247 (connection with N.A.S.A. installations pursuant to Tariff FCC No. 134); §B.28 (connections with certain facilities of the U.S. Army, Navy, and Air Force provided the appropriate Secretary of such Department certifies that connection is required by reasons of military necessity); §J (service through miscellaneouos common carriers utilizing telephone company intraexchange equipment).

[6] The prayer was for a permanent order "enjoining the defendants * * * from interfering with, harassing or preventing the sale and distribution of the Carterphone * * *" and "from threatening or intimidating any customer or prospective customer * * * with the curtailment * * * or removal of such customers' telephone service and from "directly or indirectly suggesting or advising the customers, prospective customers, and users of the Carterphone device that the use of such device may subject said persons * * * to any loss of * * * the telephone service provided by * * * [the telephone companies] * * *."

On the basis of the complaint, tariffs, regulations, and agency orders of which it could take judicial knowledge,[7] the District Court held that "primary jurisdiction" is "vested in the" FCC "to resolve all questions relating to the justness, reasonableness, validity, and effect of the tariff and practices complained of." The Court accordingly stayed further proceedings but recognized "that jurisdiction remains in the Court to pass ultimately upon the antitrust issues."

III.

No matter from what vantage viewed, the conclusion is unerringly indicated that this was a case permitting, indeed requiring, primary jurisdiction reference to the FCC.

Our principal difficulty in the case comes from the fact, made quite clear in the probing from the bench, that we simply do not understand the theories the plaintiffs so earnestly press. We can accept their insistence that the Telephone Companies read the complaint too narrowly in their argumentative effort to confine its total claim to Par. XI, see text accompanying note 5, *supra*, which affirmatively brings in and challenges AT&T Tariff FCC No. 132, note 5, *supra*. But both from the formal allegations of the complaint, and more so from a broader consideration of the very

[7] Interstate Natural Gas Co. v. Souothern Cal. Gas Co., 9 Cir., 1953, 209 F. 2d 380; Fletcher v. Jones D.C. Cir., 1939, 105 F. 2d 58, cert. denied, 308 U.S. 555, 60 S. Ct. 116, 84 L.Ed. 467; Greeson v. Imperial Irr. Dist., 9 Cir., 1932, 59 F. 2d 529.

nature of the case,[8] the tariff is inescapably at the center of this controversy.

It is here that their position becomes an enigma wrapped in a mystery. After formally denying validity or inapplicability of Tariff No. 132 in Par. XI (note 5, *supra*), in a number of ways and at endless times throughout the briefs to us they assert that they "have not attacked the reasonableness or validity" of the tariff "as a regulatory measure," and they "are quite content to assume, for the purposes of this appeal, that the tariff is valid under agency standards, but" they add, "not under antitrust standards."[9] Struggling as we do to divine their theory, we see two possibilities. The first is their repeated insistence that, as pleaded, this is a case of a concerted refusal to deal, and as such is a classic *per se* violation of the antitrust laws. The second, perhaps, is that this is an instance of the Arnall attack on the primary monopolistic purpose of an industry-wide adoption of

[8] The primary jurisdiction problem is not to be approached with any narrow, technical pleading point of view. As is well stated by McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA, Antitrust Section 57, 66-67 (1958):

> "The doctrine of primary jurisdiction was not conceived as a shield to relieve regulated industries from all responsibility under the antitrust laws for their unlawful conduct. But neither does the addition of the epithet 'conspiracy' to an agreement for concerted activity approved by an agency automatically convert an otherwise lawful agreement into an unlawful contract and combination under the antitrust laws. The purpose of the doctrine of primary jurisdiction in this field is not merely to place a premium upon pleading skills but rather to evaluate whether the critical issues posed in the antitrust case actually fall within the policymaking competence of the regulartory agency."

Indeed, what was denominated a motion to dismiss because primary jurisdiction was in the FCC was, in effect, transmuted by the Court into a motion to require, and a stay pending, reference to the FCC. See 3 Davis, Administrative Law §19.07, at 42-44 (1958 ed.).

[9] Appellants' Brief, p. 31.

a restrictive tariff. *Georgia v. Pennsylvania R.R.*, 1945, 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051. But neither of these, alone or together, rule out the tariff as a critical issue.

As to the first, the theory is really question-begging, for while concerted refusal to deal is a *per se* violation,[10] the extent and nature of the regulation of a regulated industry may make such concerted action legal.[11] *Keogh v. Chicago*

[10] Appellants vigorously press: Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 1961, 364 U.S. 656, 81 S. Ct. 365, 5 L.Ed. 2d 358; Klors, Inc. v. Broadway Hale Stores, 1959, 359 U.S. 207, 79 S. Ct. 705, 3 L.Ed. 2d 741; Eastern States Retail Lumber Dealers Ass'n v. United States, 1914, 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490; Associated Press v. United States, 1945, 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed. 2013; Fashion Originators Guild of America v. FTC, 1941, 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949, affirming 2d Cir. 1940.

[11] In Silver v. New York Stock Exchange, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L.Ed. 2d 389, the Supreme Court made this clear beyond doubt. First, the Court recognized that under the cases relied on by appellants here, see note 10, supra,

> "It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of §1 of the Sherman Act."

373 U.S. at 347, 83 S. Ct. at . . ., 10 L.Ed. 2d at 394, but the Court went on to state that "in this case, however, the presence of another statutory scheme, that of the Securities Exchange Act of 1934, means that such a conclusion is only the beginning, not the end, of inquiry," 373 U.S. at 349, 83 S. Ct. at . . ., 10 L.Ed. 2d at 395. Pinpointing the problem as being one of reconciling the aims of the antitrust laws with the policies of the Securities Exchange Act, after analyzing these policies the Court found no legislative intention to immunize completely the exchange's actions from the operation of the antitrust laws. See note 25, infra. But the Court made clear that the absence of total immunity does not automatically mean that actions in a regulated industry are to be judged by per se standards in applying the antitrust laws:

> "But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. * * * Although * * * the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, * * * it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."

373 U.S. at 360-61, 83 S. Ct. at . . ., 10 L.Ed. 2d at 402.

& Northwestern Ry., 1922, 260 U.S. 156, 162, 43 S. Ct. 47, ..., 67 L. Ed. 183, 187. This contention in effect therefore anticipates the ultimate decision of the FCC[12] and later the Antitrust Court as to the validity and significance of the tariff.[13] The same is really true as to the second, since it is difficult to believe that the FCC, from the communica-

[12] When used throughout the expression FCC order, etc. refers to the first decision thereon after appropriate judicial review. There are two methods of obtaining judicial review of an FCC decision provided by the Communications Act, 47 USCA §402. For reference to this special statutory review provision and for supplementary methods of review, see §10(b) of the Administrative Procedure Act, 5 USCA §1009(b). Under §402 the method of review depends on the kind of decision sought to have reviewed. Decisions granting, denying, modifying, and revoking designated permits and licenses, and §312 cease and desist orders are reviewable exclusively by the Court of Appeals for the District of Columbia. 47 USCA §402(b). Proceedings seeking to enjoin, set aside, annul, or suspend any other orders of the FCC must be brought pursuant to the Administrative Orders Review Act of 1950 (Hobbs Act), 5 USCA §1031 et seq., 47 USCA §402(a), in the circuit where the petitioner resides or has its principal office or in the District of Columbia Circuit. 5 USCA §1033. See generally 3 Davis. Administrative Law §23.03, at 305. It thus appears that judicial review of the FCC's determination of the validity and applicability of Tariff No. 132 would follow this second method. See, e.g., Hush-A-Phone v. United States, supra. Therefore, it is possible that the review of the FCC's determination and the review of the Antitrust Court's subsequent decision may be by different Courts of Appeals. This is to be contrasted to the situation where a District Court refers a matter to the ICC under the primary jurisdiction doctrine. There the statute expressly provides that "the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend * * * any order * * * arising out of such referral." 28 USCA §1336; see Agricultural Transp. Ass'n v. King, 5 Cir., 1965, 349 F. 2d 873, 885 n. 35.

[13] See 3 Davis, Administrative Law §19.05, at 25:

> "* * * [T]he problem is not one of application of the antitrust laws but is one of accommodation of the antitrust policy to the regulatory policy. * * * The courts are obviously well equipped to make initial decisions involving application of the antitrust policy. But, before the particular regulatory agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy."

tion-utility-point of view, could uphold as "just and reasonable," 47 USCA §201(b), 205, a tariff proved to have been brought into being by a concerted action whose aim was monopolistic, not the maintenance or improvement of telephone service.

The extravagant brandishing of antitrusts, the repetition of inflammatory epithets of combination, conspiracy, concerted action, monopolistic aim, the frequent incantation of the antitrust laws, and the fervent desire to keep the case for jury resolution in a Federal Court cannot either extinguish the Communications Act of 1934 or erase Tariff No. 132 as a significant, if not decisive, factor.

The starting point is the Communications Act of 1934, 47 USCA §151 et seq. The National communications policy is broadly stated "to make available * * * to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *," USCA §151. The execution of the statutory scheme is commented to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation.

To achieve these goals, the Communications Act grants a broad range of powers to the Federal Communications Commission. 47 USCA §§201-222. The Commission has the power to require a telephone company to furnish "service upon reasonable request therefor," and, where the Commission "finds such action necessary or desirable in the public interest," to require interconnection with other carriers at

rates set by the Commission after opportunity for hearing. 47 USCA §201(a). "All charges, practices, classifications, and regulations" of telephone companies "shall be just and reasonable;" "unjust or unreasonable" charges are unlawful, 47 USCA §201(b). The Commission has the power to prescribe such rules and regulations as are "necessary in the public interest" to carry out the provisions of the Act. 47 USCA §201(b). To this end, the Commission has promulgated 493 pages of regulations governing the common carrier services provided by telephone companies. 47 C.F.R., Parts 20-69. It is unlawful for a telephone company to discriminate in any "unjust or unreasonable" manner in its "charges, practices, classifications, regulations, facilities, or services." 47 USCA §202(a). Each telephone company is required to file with the Commission, and keep open for public inspection, tariffs setting forth its charges, classifications, regulations, and practices. 47 USCA §203(a). Such traiffs must be followed until such time as they are amended in the manner provided by the statute. 47 USCA §203(b). A telephone company may not provide service unless tariffs are filed covering such service and the company may not deviate from the rates, classifications, regulations or practices containd in the tariffs so filed. 47 USCA §203(c).

The FCC has the power and duty to examine all tariffs filed and may either on complaint or on its own initiative determine and prescribe what charges, classifications, regulations, and practices are "just, fair, and reasonable" and are to be thereafter followed by the telephone company in ques-

tion. 47 USCA §205(a). The Commission is given extensive power to assess the value of the facilities of telephone companies. 47 USCA §213. The Commission has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is "in the interest of public convenience and necessity" or "the expense involved therein will not impair the ability of the carrier to perform its duty to the public." 47 USCA §214(d). However, a carrier does not have the right to extend its lines unless the Commission authorizes it to do so by the issuance of a certificate of public convenience and necessity. 47 USCA §214(a). The Commission has power to examine transactions entered into by any common carrier which may affect the carrier's charges or services. 47 USCA §215(a). The Commission has the specific duty to keep informed as to "technical developments and improvements in wire and radio communication * * * to the end that the benefit of new inventions and developments may be made available to the people of the United States." 47 USCA §218.

Against this intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review, one thing emerges clearly. It is that Tariff No. 132, its meaning, its scope, its applicability, its validity for any or all governmental purposes, is ever-present. The best illustration is to accept momentarily the concession[14] of appellants that the tariff is authoritatively held to be valid administratively for regula-

[14] Appellants do not make this as an *arguendo* assumption. On their thesis they accept it as valid for so-called "administrative" regulatory purposes.

tory purposes, to which they add, but not valid for antitrust purposes. We can recognize, of course, that in this sometime weird antitrust world, in which antitrust policies appear to have an overpowering influence in the running clash between supposedly coordinate executive agencies or departments of the same Government, *cf. California v. FPC*, 1962, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54, it is possible for the Courts to hold finally that this result could occur. But that choice ought not to be made, the occasion for facing such a possibility ought not to be forced until it is inescapably necessary. The very difficulties inherent in that prospect demonstrate that.

On any such hypothesis, of course, a significant thing will be the FCC determination of the validity of Tariff No. 132. If, as the law clearly permits,[15] the monopolistic and anti-

[15] Under statutory rate and practice standards of "just and reasonable," many technical and administrative factors are involved in the light of the industry being regulated. Some of the factors, many complex and highly technical, as we advance in the electronic age, concerning maintenance and upkeep of non-furnished equipment with resulting deterioration of high quality service for both incoming and outgoing calls, are illustrated in several cases. See, e.g., Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co., Minn. R.R. & Warehouse Comm'n, 1965, 60 P.U.R. 3d 363; City of Los Angeles v. Southern Cal. Tel. Co., Cal. R.R. Comm'n, 1933, 2 P.U.R. (NS) 247; In the Matter of AT&T & Western Union Tel. Co., F.C.C., 1948, Docket No. 8963. One of the factors, especially where, as here, the matter is precipitated by antitrust claims, is the propriety, if not the duty, of the administrative agency to consider monopolistic and antitrust implications. The Supreme Court has made this clear. In United States v. Radio Corp. of America, 1959, 358 U.S. 334, 348, 79 S. Ct. 457, ... 3 L.Ed. 2d 354, 364, the Court said:

> "Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged anti-

(footnote continued on following page)

trust implications of the practices compelled by the tariff were among the factors considered and evaluated by the FCC, a Court would be hard put in either contriving or thereafter verbalizing a concept which, in a sort of now-you-see-it, now-you-don't sleight of hand, would allow the tariff to be valid and yet invalid at one and the same time.[16]

Despite the disparagement of plaintiffs that the tariff is initially the handwork of the Telephone Companies' scriveners and is, at any event, not a rate but a mere equipment tariff, two things are positive. First, a tariff, required by law to be filed, is not a mere contract. It is the law. *Compania*

(footnote continued from preceding page)

trust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance."

Even more pointed is the holding in McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 80, 64 S. Ct. 370, ..., 88 L.Ed. 544, 553, where the Court held:

"But in executing those policies [of the transportation Act committed directly to the ICC] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned."

See also FCC v. RCA Communications, Inc., 1953, 346 U.S. 86, 73 S. Ct. 998, 97 L. Ed. 1470; City of Pittsburgh v. FPC, D.C. Cir., 1956, 237 F. 2d 741, 754.

[16] Cf. Pan American Airways v. United States, 1963, 371 U.S. 296, 309, 83 S. Ct. 476, ..., 9 L. Ed. 2d 325, 335:

"It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in §2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under §408 should run afoul of the antitrust laws."

Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 5 Cir., 1962, 303 F. 2d 692, 696 & n. 12, cert. denied, 371 U.S. 942, 83 S. Ct. 321, 9 L. Ed. 2d 276; *United States v. Associated Air Transp. Inc.*, 5 Cir., 1960, 275 F. 2d 827, 833. Second, the telephone utility is required to file in its schedules and tariffs "the classifications, practices, and regulations affecting such charges," 47 USCA §203(a). The "classifications, practices, and regulations," as well as the charges, must be "just and reasonable." 47 USCA §201(b). The Commission is empowered to determine whether they are and its power extends to determining "what classification, regulation, or practice is or will be just, fair, and reasonable." 47 USCA §205(a). The "* * * Commission's range of power over the regulated companies" extends to "* * * 'charges, practices * * * *" and "is not limited to rates and * * * services." *Ambassador, Inc. v. United States*, 1945, 325 U.S. 317, 323, 65 S. Ct. 1151, ..., 89 L. Ed. 1637, 1642. Considering that so long as the tariff is "administratively" valid and applicable—as is assumed—the Telephone Company not only may, but must, enforce it uniformly as to all similarly situated, to permit the Antitrust Court to declare it invalid would be putting judicial imprimatur on operational chaos. It would require in effect that the Telephone Company disconnect service to those using Carterphones but who do not sue, while continuing service to those who sue. Worse, ratepayers, including those coerced under the operative effect of the tariff to discontinue Carterphone, would bear their proportionate part of the amount of triple damages and attorneys' fees

paid out to the successful antitrust suing customer.[17] That chaos, of course, could be eliminated by the Antitrust Court holding that despite earlier FCC approval of the tariff, the monopolistic implications are so great that it cannot stand for any purpose. This, in effect, would be a first, second, or third tier re-review[18] of an already reviewed administrative decision.[19] The likelihood of this occurring is remote enough to say that the prospect ought not to be anticipated.

There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone. This is not to say, as the appellants' briefs contend, that contrary to *United States v. Radio Corp. of America, supra,* 358 U.S. at 343-46, 79 S. Ct. at ....., 3 L. Ed. 2d at 361-62; *California v. FPC, supra; United States v. Philadelphia Nat'l Bank, supra,* 374 U.S. at 350-54, 83 S. Ct. at ....., 10 L. Ed. 2d at 937-39; and *Silver v. New York Stock Exchange, supra,* the Communications Act of

[17] See generally von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929 (1954), who concludes:

> "The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters—the regulatory statute as administered by the agency and the antitrust laws as administered by the courts. * * * It is nothing* more than a procedural device to secure preliminary administrative determinations of regulatory matters."

Id. at 965-66

*We would add this caveat: "Nothing" is a very very positive word, perhaps too much so.

[18] First tier, the District Court trying the antitrust suit; second tier, the Court of Appeals reviewing that decision; third tier, the Supreme Court.

[19] See note 12, supra.

1934 either confers immunity on telephone companies or commits to the FCC the determination of antitrust issues as such. What we do say is that inescapably presented is the question whether the practice permitted, indeed required, by Tariff No. 132 is lawful. If it is legal, and if it must be applied to all alike, then surely a significant issue having important, if not decisive, impact on the outcome of the antitrust litigation has been exercised.

That this is a role of primary jurisdiction reference is demonstrated by assuming the success of the present appeal, our reversal of the stay pending reference and the immediate trial of the antitrust suit. By-passing the difficult problems of what treatment, if any, the trial Judge would give to Tariff 132 either in the admission of evidence or jury instructions,[20] how would the validity and application of the tariff ever be effectively determined by the FCC with respect to this particular antitrust case and the assumed judgment for triple damages? In the face of the Seventh Amendment, could the District Court after jury trial and verdict then

[20] In the District Judge's memorandum opinion, he stated:

"Determinations that regulatory tariffs are just, reasonable and valid permeate every aspect of telephone communications regulation. * * * The antitrust laws and the precise ingredients of this case are among the relevant factors for FCC consideration in determining the justness, reasonableness, validity, application and effect of the tariff and practices here involved."

This is not, as supposed from some of the Judge's comments during colloquy or as asserted in appellant's brief, to be read as a predetermination that the FCC either would or could or should evaluate this in the traditional antitrust Sherman Act "rule of reason" concept, see FCC v. RCA Communications, Inc., supra; McLean Trucking Co. v. United States, supra, or that the question of reasonableness is even open for inquiry in the per se case, see note 10, supra; *but see* note 11, supra. The regulatory statutory standard of "just and reasonable" reflects many factors, including antitrust implications. See note 15, supra.

make a reference? Could the Court of Appeals? The Supreme Court?[21] If referred at that late stage what record would the FCC consider? The one hammered out under the narrow rules of episodic civil trial? A broad industry-wide survey with full administrative exploration of the scientific and technical problems? Assuming the ultimate FCC determination thereafter of applicability and validity, how or in what manner could this be applied to penetrate the foggy mystery of the jury's general verdict? To these questions we do not even begin to suggest an answer. Nor do the plaintiffs. They simply ignore them on the simple, but natural, desire that, through the incantation of these magic antitrust epithets, these serious problems about Tariff No. 132 and its effective enforcement will somehow go away.

Embracing fully and enthusiastically the proposition that "no fixed formula exists for applying the doctrine of primary jurisdiction" and that in "every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes is serves will be aided by its application in the particular litigation,"[22] this Court has given full voice to this device. And in nearly every instance where we order it, it ought first to have been ordered by the trial Court. Thus, contrary to the suggestion of appellants that as Judges we are in as good a position to read Tariff No. 132

[21] Cf. Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S. Ct. 1222, 4 L.Ed. 2d 1170, on certification upon remand, Fla., 1961, 133 So. 2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F. 2d 505, rev'd, 1964, 377 U.S. 179, 84 S. Ct. 1197, 12 L.Ed. 2d 229; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F. 2d 347.

[22] United States v. Western Pac. R.R., 1956, 352 U.S. 59, 64, 77 S. Ct. 161, ..., 1 L.Ed. 2d 126, 132.

as the FCC, we sent a tariff construction problem to the ICC in *Louisville & N.R.R. v. Knox Homes Corp.*, 5 Cir., 1965, 343 F. 2d 887. There it was tariffese which created the problem. Here it is largely technological consideration as to the equipment, apparatus, etc., reasonably within the tariff's description. In *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922, aff'd, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, we ordered reference to the ICC of a serious problem of law under published tariffs. And in *Agricultural Transp. Ass'n v. King*, 5 Cir., 1965, 349 F. 2d 873, we sent to the FCC for initial determination the serious and far-reaching question of law concerning the interpretation and application of the Transportation Act and the interplay of the Agricultural Marketing Act, 12 USCA §1141.

The brief analysis which we have made demonstrates convincingly that the construction, application, and validity of Tariff No. 132 is a critical, if not decisive, issue. As in many other antitrust or similar cases, primary jurisdiction reference was imperatively called for.[23] *Far East Conference v. United*

[23] Indeed, the Telephone Companies have referred us to at least four cases in which the precise relationship of the antitrust laws to the jurisdiction of the FCC has been considered by District Courts. Marcom, Inc. v. American Tel. & Tel. Co., No. 43215, N.D. Cal., July 28, 1965; Western States Tel. Co. v. American Tel. & Tel. Co., No. 64-175-PH, S.D. Cal., July 28, 1964; Secrafone v. Illinois Bell Tel. Co., Civ. No. 60C-1022; N.D. Ill., 1961; Pastor v. American Tel. & Tel. Co., S.D N.Y., 1940, 76 F. Supp. 781. In each case it was alleged that the actions of the defendant telephone companies, taken in accordance with their foreign attachment and interconnection tariffs, had prevented the plaintiffs from marketing their various devices designed for attachment to or interconnection with the channels of the defendants, and that such actions thus violated the antitrust laws. In each case it was held that primary jurisdiction lay in the FCC and appropriate state commissions.

States, 1952, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576; *United States Nav. Co. v. Cunard S.S. Co.*, 1932, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408; *Pan American World Airways, Inc. v. United States*, 1963, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325; *Carnation Co. v. Pacific Westbound Conference*, 1966, ... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 709, as amended, ... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 851. Although *United States v. Radio Corp. of America, supra*, stands for the proposition that there is no necessity to invoke the primary jurisdiction of the FCC in an antitrust suit challenging a television acquisition,[24] the Court, contrasting television with the "pervasive regulatory scheme" prescribed in the Communications Act for telephone and telegraph companies, fully recognized that where tariff structures might be thrown "out of balance" and "sporadic action by federal courts" might "work * * * mischief," 358 U.S. at 350, 79 S. Ct. at ....., 3 L. Ed. 2d at 365, primary jurisdiction is available. So did the Court in *Silver v. New York Stock*

[24] Although this proposition is certainly laid down, it was unnecessary to the holding of the Court since the FCC had already approved the acquisition and there was nothing left for the Court but the task of accommodating the policies of the Communications Act to the aims of the antitrust laws. The Court indeed undertook this task, held that the approval of the FCC did not immunize the acquisition from the antitrust laws, and could have disposed of the case solely on this ground. See 3 Davis, Administrative Law §19.06, at 16 (1965 Supp.). This is precisely what the Court did in United States v. Philadelphia Nat'l Bank, supra. Assuming, but expressly not deciding, 374 U.S. at 353 n. 32, 83 S. Ct. at . . . . n. 32, 10 L.Ed. 2d at 939 n. 32, "the applicability of the doctrine (of primary jurisdiction) to merger-application proceedings before the banking agencies," the Court noted that "the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced," 374 U.S. at 353, 83 S. Ct. at . . ., 10 L.Ed. 2d at 939, and disposed of the case on the ground that the Comptroller's approval of the bank merger did not immunize the transaction from the operation of the antitrust laws.

Exchange, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389.[25] That the ultimate decision of the FCC may not be an end to the matter is neither unexpected nor decisive. For the doctrine applies "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference v. United States*, 1952, 342 U.S. 570, 574, 72 S. Ct. 492, ..., 96 L. Ed. 576, 582. Nor is it "even if the court thinks that the arrangement alleged to violate the antitrust laws cannot be legally approved by the agency" for "the court should still allow the agency first to pass upon the question." 3 Davis Administrative Law §19.07, at 40 (1958). Nor is a reference a prejudgment that the regula-

[25] In *Silver*, the Court held that "the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power," and noted that "this aspect of the statute * * * obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into Court." 373 U.S. at 358 & n. 12, 360, 83 S. Ct. at . . . . & n. 12, ..., 10 L. Ed. 2d at 400 & n. 12, 402. Pursing this further, the Court noted that "there is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rule so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends," and recognized in footnote 12 that "should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Ibid.* Here, to the contrary, not only can the parties resort to the FCC for a determination of whether the "practice" of the telephone companies pursuant to Tariff No. 132 is "just and reasonable," 47 USCA §205, with a right to have this determination reviewed in the appropriate Court of Appeals, see note 12, supra, but that determination must certainly include consideration of antitrust policies, see note 15, supra. These differences from the SEC scheme there in issue require that the Antitrust Court not decide this question until the FCC's determination makes it necessary, and then with the guidance of the FCC's resolution of the technical problem involved.

tory act or agency offers antitrust immunity as such for "reference to an administrative agency is not restricted to situations when the agency has the power to immunize."[26] *Maddock & Miller, Inc. v. United States Lines*, 2 Cir., 1966, ..., F. 2d ....., ... [1966 Trade Cases ¶ 71730, at 82301].

In affirming this primary jurisdiction reference to the FCC,[27] we must sound to all hands this caveat. In analyzing the contentions pro and con in the quest for seeking and identifying critical issues for initial administrative determination, nothing we have said or left unsaid, nothing expressed or implied, is to be considered as even a remote possible whisper of a suggestion as to how any one or more or all of the issues now disclosed or hereafter revealed are ultimately to be decided. All of those decisions are to be made first by the trial Judge when and after the primary jurisdiction reference has been concluded.

AFFIRMED.

---

[26] Contrary to appellants' contention, the trial Judge did not directly or impliedly pass on the question of immunity. This and all other questions were deferred pending reference to the FCC.

[27] While the effect of the order of reference is to impose on the appellants the burden of filing a complaint with the Commission, 47 USCA §208; 47 CFR §§1.701-735, the obligation to institute and prosecute such reference in good faith rests equally on the Telephone Companies as a condition to the continuation of the stay order. The Commission can on its own initiative order an investigation on whether a particular practice is "just and reasonable" and thereupon issue a cease and desist order, 47 USCA §205(a). More significant it may, in accordance with §5(d) of the APA, 5 USCA §1004(d), "on motion or its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR §1.2. We again emphasize that nothing we have said here is intended to limit the manner in which the referred question (and all matters related thereto) are to be presented to the Commission, blueprint the type of proceeding to be followed by the Commission, limit the scope of the Commission's inquiry, delineate the factors to be considered by the Commission, or indicate the conclusion to be reached by either the Commission or the District Court after the former has acted.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 23556

D. C. Docket No. 3-1294-Civil Action

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.,
Appellees.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Thomas F. Carter and Carter Electronics Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 17, 1966

Issued as Mandate:

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APPENDIX B

Before the

Federal Communications Commission

WASHINGTON, D. C. 20554

Docket No. 16942

In the Matter of
Use of the Carterphone Device in
Message Toll Telephone Service

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 20th day of October 1966;

1. The Commission has under consideration the decision of the United States Court of Appeals for the Fifth Circuit in *Carter, et al. v. American Telephone and Telegraph Co., et al.*, (No. 23556, Slip Opinion, August 17, 1966) and the regulations published in American Telephone and Telegraph Company Tariff F.C.C. No. 132 (Message Toll Telephone Service) which purport to govern the extent to which telephone users may attach or connect devices to the facilities of the operating telephone companies for use in interstate or foreign message toll telephone service.

2. In the above-referred to decision the Court of Appeals affirmed a February 8, 1966, decision by the United States District Court for the Northern District of Texas, Dallas Division, wherein that District Court, in a private antitrust action for treble damages and injunctive relief filed by Thomas F. Carter and Carter Electronics Corporation against American Telephone and Telegraph Co. and the General Telephone Company of the Southwest, invoked the doctrine of primary jurisdiction and referred to this Commission for

resolution, the question of the justness, reasonableness, validity and effect of the tariff regulations and practices complained of in the aforesaid action and wherein the said District Court stayed the proceedings in the aforesaid action pending the conclusion of appropriate administrative proceedings initiated before the Commission, *Carter, et al. v. American Telephone and Telegraph Co., et al.*, (Memorandum Order filed February 8, 1966, Civil Action No. 3-1294).

3. In view of the foregoing, IT IS ORDERED, That, pursuant to the provision of Sections 201, 202, 203, 205, 403 and 411 of the Communications Act of 1934, as amended, a public hearing shall be held at a time and place to be hereinafter designated upon the following specific issues:

ISSUES

(a) The nature and extent of the public need and demand for the use of the Carterphone device in connection with interstate or foreign message toll telephone service;

(b) The effect, if any, of the use of the Carterphone device upon the operation of the telephone system used to provide interstate and foreign telephone message toll telephone services to the public or upon the employees and facilities of the telephone companies providing such services or upon the public in its use of such telephone system;

(c) Whether the provisions of Tariff F.C.C. No. 132 of American Telephone and Telegraph Company may properly be construed to prohibit any telephone user from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate and foreign message toll telephone services;

(d) If the aforesaid tariff provisions may properly be construed to prohibit telephone users from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services:

(1) Whether such regulations are, or will be, unjust and unreasonable and, therefore, unlawful within the

meaning of Section 201(b) of the Communications Act of 1934, as amended, or are, or will be, unduly discriminatory or preferential in violation of Section 202(a) of said Act;

(2) Whether, in the light of facts developed in connection with the foregoing issues, the Commission, in accordance with the provisions of Section 205 of the Act, should prescribe tariff regulations which will permit the use of the Carterphone device in connection with interstate and foreign message toll telephone service and, if so, the kind of tariff regulation which should be so prescribed;

(e) If the aforesaid tariff regulations of the telephone companies may not properly be construed to prohibit telephone users from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services, what action, if any, should be taken by the Commission with respect thereto.

4. IT IS FURTHER ORDERED, That Thomas F. Carter, Carter Electronics Corporation, the American Telephone and Telegraph Co., the General Telephone Company of the Southwest, and the associated Bell System companies listed in the attached Appendix are hereby made parties respondent to this proceeding and a copy of this Order shall be served upon each such party respondent.

5. IT IS FURTHER ORDERED, That any concurring, connecting and other participating carrier, listed as such in the aforesaid tariff, the United States Independent Telephone Association, the General Telephone and Electronics Service Corporation, the National Association of Railroad and Utilities Commissioners and any state regulatory body is HEREBY GRANTED leave to intervene upon the filing of a notice of intention to appear and participate in these proceedings within 30 days from the date of the publication of this Order in the Federal Register.

6. IT IS FURTHER ORDERED, That a hearing examiner SHALL BE DESIGNATED to preside in the proceedings ordered herein who shall prepare an initial decision on all of the issues as provided in Section 1.267 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released:
October 21, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 772

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY, AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

BRIEF OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 12, 1966

FIDELITY PRINTING COMPANY, INC., HOUSTON

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